Decision 14-07-028 July 10, 2014

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking regarding whether, or subject to what conditions, the suspension of Direct Access may be lifted consistent with Assembly Bill 1X and Decision 01-09-060.	Rulemaking 07-05-025 (Filed May 24, 2007)

ORDER MODIFYING DECISION (D.) 11-12-018, AND DENYING REHEARING OF DECISION, AS MODIFIED

I. INTRODUCTION

In Decision (D.) 11-12-018 (or "Decision"), we adopted various updates and reforms in the rate setting methodologies and rules applicable to direct access ("DA") service. Among other things, the Decision determined what costs constitute reentry fees pursuant to Public Utilities Code section 394.25(e)[1] for DA customers that are involuntarily returned to service provided by an investor-owned utility ("IOU").

Southern California Edison Company ("SCE") and Pacific Gas and Electric Company ("PG&E") timely filed an application for rehearing of D.11-12-018. The rehearing application alleges that D.11-12-018 exceeded the Commission's authority and violated section 394.25(e) by concluding that electric service providers ("ESPs") were not liable for all incremental procurement costs arising from an involuntary return of DA customers to utility procurement service.

The Alliance for Retail Energy Markets, Bluestar Energy, Direct Access Customer Coalition, Retail Energy Supply Association, and Commercial Energy and

[1] All subsequent section references are to the Public Utilities Code, unless otherwise specified.

School Project for Utility Rate Reduction (jointly), and the City and County of San Francisco filed responses to the rehearing application.

We have reviewed each and every argument raised in the rehearing application and are of the opinion that modifications, as described herein, are warranted to clarify our authority to set rates for the public utilities subject to our jurisdiction and our authority under section 394.25(e). As modified, rehearing of D.11-12-018 is denied.

II. DISCUSSION

SCE and PG&E allege that the costs that must be imposed on involuntarily returned DA customers to avoid shifting them to other utility customers are reentry fees under section 394.25(e), and are the ultimate responsibility of the ESPs under that statute. (Rehrg. App., p. 6.) They allege that we erred by finding that incremental procurement costs for large DA and affiliated customers are not reentry fees under section 394.25(e). (Rehrg. App., p. 7.)

Section 394.25(e) states:

> If a customer of an electric service provider or a community choice aggregator is involuntarily returned to service provided by an electrical corporation, *any reentry fee imposed on that customer that the commission deems is necessary* to avoid imposing costs on other customers of the electrical corporation shall be the obligation of the electric service provider or a community choice aggregator, except in the case of a customer returned due to default in payment or other contractual obligations or because the customer's contract has expired. As a condition of its registration, an electric service provider or a community choice aggregator shall post a bond or demonstrate insurance sufficient to cover those reentry fees. In the event that an electric service provider becomes insolvent and is unable to discharge its obligation to pay reentry fees, the fees shall be allocated to the returning customers.

(Pub. Util. Code, § 394.25, subd. (e), emphasis added.)

The plain language of section 394.25(e) gives the Commission the discretion to determine what constitutes a reentry fee under that statute. (Pub. Util. Code,

§ 394.25, subd. (e); D.11-12-018, p. 108 [Conclusion of Law ("COL") 6].) As the agency authorized by the Constitution to administer the provisions of the Public Utilities Code, the Commission is entitled to great deference in its interpretation of the Public Utilities Code. (*Greyhound Lines, Inc. v. Public Utilities Com.* (1968) 68 Cal.2d 406, 410-411.) The California Supreme Court has held: "the [C]ommission's interpretation of the Public Utilities Code should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language…." (*Ibid*.)

We ordered that all large commercial and industrial involuntarily returned DA customers returning to IOU service be placed on the Transition Bundled Service ("TBS") tariff rate. (D.11-12-018, p. 117 [Ordering Paragraph ("OP") 22].) The TBS rate is based on the spot market price and covers the IOU's costs of incremental procurement to serve returning customers. (D.11-12-018, pp. 41 & 61.) The TBS rate may be higher or lower than the rate for bundled portfolio service ("BPS"). (See *Opinion Adopting Rules for Switching Exemption* [D.03-05-034] (2003), at p. 20 (slip op.).)[2] By paying the TBS rate, returning DA customers avoid shifting incremental procurement costs to utility bundled customers. Therefore, we deemed it unnecessary to impose a reentry fee to cover incremental procurement costs for customers paying the TBS rate. (D.11-12-018, pp. 67-68.)

We found that as sophisticated businesses with experience in obtaining goods and services via contracts, large commercial and industrial customers should be able to negotiate contractual provisions with their ESP to protect themselves in event of a breach, recognizing the potential to be subject to TBS rates if they return to IOU service. (D.11-12-018, p. 68.) In contrast, we found that small commercial and residential DA customers may not possess the same degree of business sophistication and should be protected from the risk of higher procurement costs resulting from an involuntary return

[2] All citations to Commission decisions refer to the Commission's decision number as found in the official pdf versions which are available on the Commission's website at: http://docs.cpuc.ca.gov/DecisionsSearchForm.aspx.

to bundled service. (D.11-12-018, p. 68.) Thus, we determined that these customers should pay the BPS rate upon return to bundled service. (D.11-12-018, p. 68.) Since the BPS rate may not fully cover the IOUs' incremental procurement costs, we deemed it necessary to impose a reentry fee covering the incremental procurement costs for customers paying the BPS rate to prevent cost-shifting to other bundled customers. (D.11-12-018, pp. 117-118 [OP 23].)[3]

We have the authority to establish rates and allocate costs for all of the public utilities subject to our jurisdiction. (Cal. Const., Art. XII, § 6; see also Pub. Util. Code, §§ 451 & 454.) We modify the Decision, as set forth in the ordering paragraph below, to clarify that we have the authority to set rates for involuntarily returning DA customers. Here, we determined that large commercial and industrial DA customers should pay the TBS rate upon a return to bundled IOU service; whereas small commercial and residential DA customers should pay the BPS rate. SCE and PG&E fail to demonstrate that we erred or exceeded our authority in establishing these rates for involuntarily returning DA customers.

We properly exercised our discretion pursuant to section 394.25(e) to determine what reentry fees are necessary in order to avoid shifting costs to other customers of the electrical corporation. Payment of the TBS rate prevents the shifting of incremental procurement costs to other bundled customers, while payment of the BPS rate may result in the shifting of these costs to other bundled customers. Thus, we deemed it unnecessary under section 394.25(e) to impose a reentry fee for these costs for returning DA customers paying the TBS rate but necessary for those customers paying the BPS rate. We modify the Decision, as set forth in the ordering paragraphs below, to clarify our authority under section 394.25(e) and our rationale for determining what reentry fees are necessary for returning DA customers subject to the TBS rate.

[3] Small commercial and residential DA customers would still have to pay for incremental procurement costs if the ESP is insolvent and unable to pay the reentry fees. (Pub. Util. Code, § 394.25, subd. (e).)

SCE and PG&E assert that the intent of section 394.25(e) is to hold ESPs liable for the costs of reentry for an involuntary return of DA customers to IOU service. (Rehrg. App., p. 5.) According to SCE and PG&E, the plain language of section 394.25(e) protects both DA and bundled service customers from the costs arising from the involuntary return of DA customers to IOU service. (Rehrg. App., p. 3.) Contrary to SCE and PG&E's assertions, the statute only references the imposition of reentry fees that the Commission deems is necessary to avoid the shifting of costs to "other customers of the electrical corporation." (Pub. Util. Code, § 394.25, subd. (e); D.11-12-018, p. 110 [COL 19].) There is nothing in the statute that mandates that the ESP indemnify DA customers for the rates they pay for electric service upon a return to IOU service. As explained above, in accordance with the statute, we imposed reentry fees that we deemed necessary to avoid cost-shifting to "other customers of the electrical corporation."

Relying on section 366.2(c)(13),[4] SCE and PG&E also assert that the Legislature made clear that all costs of reentry, which include incremental procurement costs, must be reflected in the reentry fees under section 394.25(e). (Rehrg. App., p. 6.) Section 366.2(c)(13) discusses the ability of retail customers to opt-out from community choice aggregation ("CCA") services, and states, in part: "Any reentry fees to be imposed after the opt-out period … shall be approved by the [C]ommission and shall reflect the cost of reentry." (Pub. Util. Code, § 366.2, subd. (c)(13).) Nothing in this statute mandates that incremental procurement costs are reentry fees under section 394.25(e). As SCE and PG&E note, section 366.2(c)(13) addresses opt-out provisions for CCA customers. Even in the context of CCA opt-outs, we previously defined reentry fees as including the utility's administrative cost for transferring the customer back to the utility but did not make a determination as to whether incremental procurement costs should be included as part of the reentry fees. (*Order Resolving Phase 1 Issues on Pricing and*

[4] This section was section 366.2(c)(11) prior to the enactment of Senate Bill 790 (Stats. 2011, ch. 599). SCE and PG&E filed their rehearing application prior to the enactment of Senate Bill 790, and the rehearing application cites to the former code section.

Costs Attributable to Community Choice Aggregators and Related Matters [D.04-12-046] (2004), at p. 19 (slip op.).)[5]

SCE and PG&E also challenge the Decision's conclusion that requiring all incremental procurement costs to be covered under an ESP bond could potentially have a material adverse impact on the viability of DA. (Rehrg. App., pp. 9-10; see also D.11-12-018, pp. 58-59.) SCE and PG&E allege that we cannot disregard the express legislative directives in section 394.25(e) for policy reasons. (Rehrg. App., p. 9.) For the reasons explained above, SCE and PG&E fail to demonstrate that our interpretation of section 394.25(e) is unlawful. SCE and PG&E also fail to explain how our concerns regarding the policy ramifications of including incremental procurement costs in ESP bonding requirements have any bearing on the lawfulness of our interpretation of section 394.25(e). The purpose of a rehearing application is to alert the Commission to legal error, not to relitigate policy determinations.[6] (Pub. Util. Code, § 1732, Cal. Code Regs., tit. 20, § 16.1, subd. (c).) SCE and PG&E's allegation that we made an incorrect policy determination fails to demonstrate any legal error in the Decision.

Based on the foregoing, we find that the rehearing application fails to demonstrate any legal error in the Decision and should be denied.

III. CONCLUSION

We modify the Decision to clarify our authority to set rates for the public utilities subject to our jurisdiction and our authority under section 394.25(e). As

[5] Issues regarding reentry fees and bond issues for involuntarily returned CCA customers are under consideration in Rulemaking (R.) 03-10-003. (D.11-12-018, pp. 111-112 [COL 27].)

[6] We considered and rejected PG&E and SCE's proposal for a methodology to calculate the ESP security bond finding that: "Because PG&E and SCE have only presented illustrative bond calculations, and omitted key inputs relating to implied volatility, there is uncertainty concerning how large an ESP's resulting bond obligation could be, as well as the resulting costs which could tend to make DA service less cost effective." (D.11-12-018, pp. 103-104 [Finding of Fact ("FOF") 38]; see also D.11-12-018, pp. 82-85.) It is this uncertainty that we determined could have an adverse effect on the viability of the DA market. (D.11-12-018, p. 104 [FOF 39].)

modified, we deny the application for rehearing of D.11-12-018 for the reasons stated above.

THEREFORE, IT IS ORDERED that:

1. D.11-12-018 shall be modified as follows:

   a. The second sentence of the third paragraph on page 3 beginning with "In order to prevent cost shifting…" is deleted and replaced with the following:

      "We require that involuntarily returned large commercial and industrial customers bear the risks of increased procurement costs through payment of the Temporary Bundled Service ("TBS") tariff. Payment of the TBS rate prevents shifting of these costs to bundled customers, and thus, we do not find it necessary to impose a re-entry fee under section 394.25(e) for these costs for returning DA customers paying the TBS rate."

   b. The first sentence of Conclusion of Law 11 on page 109 is deleted and replaced with the following:

      "Involuntarily returning large commercial and industrial DA customers (and small DA customers affiliated therewith) should be placed on the TBS rate. Payment of the TBS rate avoids the shifting of incremental procurement costs from DA customers to utility bundled customers."

   c. Conclusion of Law 12 on page 109 is modified to read:

      "The Commission has the authority to establish rates for the electrical corporations under its jurisdiction."

   d. Conclusion of Law 21 on pages 110-111 is modified to read:

      "The Commission has the discretion to determine what re-entry fees are necessary under § 394.25(e) to avoid cost shifting to bundled customers in the event of an en masse involuntary return of an ESP's customers to bundled utility service."

e. Conclusion of Law 23 on page 111 is modified to read:

"If incremental procurement costs resulting from serving involuntarily returned DA customers are recovered through a TBS rate, it is unnecessary to include these costs in re-entry fees pursuant to § 394.25(e) as the TBS rate prevents cost shifting to bundled customers."

2. The application for rehearing of D.11-12-018 is denied.

3. Rulemaking (R.) 07-05-025 is closed.

This order is effective today.

Dated July 10, 2014, at San Francisco, California.

MICHAEL R. PEEVEY
President
CATHERINE J.K. SANDOVAL
CARLA J. PETERMAN
MICHAEL PICKER
Commissioners

Commissioner Michel Peter Florio, being necessarily absent, did not participate.